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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 76-69

EDWARD WALSH, as Trustee in Bankruptcy for PALMER
DATA CORPORATION dba COMPUTERMINAL,
Petitioner,

vs.

UNITED STATES DISTRICT COURT, FOR THE
NORTHERN DISTRICT OF CALIFORNIA,
Respondent,

BURROUGHS CORPORATION,
Respondent and Real Party in Interest.

SUPPLEMENTAL BRIEF IN SUPPORT OF THE
PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Since the filing by the Petitioner Walsh of his Reply Brief in Support Of The Petition For Writ of Certiorari, the Respondent Burroughs has advised Walsh that Mr. Lucius Browne, the highest and most important Bur-

roughs official¹ to testify at the third trial, will not be produced for examination by Petitioner Walsh at the fourth trial. Instead, should the fourth trial proceed, Burroughs asserts that Walsh must read the Browne testimony to the jury. This capricious tactic by Burroughs further demonstrates that justice and fairness cannot be achieved in this case unless this Court grants the Petition.

In the third trial, the District Court advised the jury as follows:

"In the end, I would say that the reason it is so fortunate to have a jury case instead of a nonjury case in this field is because, as I have repeatedly said, *the ultimate test here will turn out, I am sure, to be credibility.*" (TR 2896.)

After Petitioner Walsh examined Browne in the third trial, Burroughs itself was forced to admit that Browne had failed to give true testimony under oath. In the defendant Burroughs' opening statement to the jury which followed the plaintiff's case in chief, counsel for Burroughs was compelled to advise the jury as follows:

"We have had three witnesses that work for or worked for Burroughs. The first was Mr. L. O. Browne, who counsel knows *was not as candid or as*

¹In addition to having served as a Branch Manager, a District Manager, a Regional Manager, and Assistant General Sales Manager for Burroughs, Browne served four to five years as the Administrative Assistant to the Vice President of Marketing and one year as the Assistant to the President of Burroughs Corporation. (Browne, Feb. 2, 1974 TR 336; 337.) During the relevant time period, Browne became the "Manager of Timesharing and Data Centers starting in 1969, and this particular position was on the corporate staff, and I subsequently was Manager of Time-sharing and Data Centers for the Business Machine Group which has marketing responsibility throughout the United States." (Browne, TR 102.)

*frank or as open as a witness should be in a litigation like this. * * * I do not think he expressed himself with the candor that one has the right to expect of a person under oath."*

(TR 2200, Counsel for Burroughs, Defendant's Opening Statement.)

Browne was the most important adverse witness for the Petitioner Walsh. He participated in most of the activity which prevented the plaintiff from an opportunity to compete and was either the sender or recipient of most of the documents offered into evidence by the plaintiff.

The words spoken by a witness on the stand are not the only criteria by which his credibility is judged. The witness' demeanor while testifying and the manner in which he testifies are as important, and sometimes more important, than what the witness actually says. Indeed, as anyone who has had trial experience knows, the lengthy reading of testimony to a jury is an excruciating and boring affair which not only deprives the jury of a view of the witness' demeanor and the manner in which he testifies but also makes it difficult to maintain the jury's attention to listen to the actual testimony itself. The Petitioner Walsh therefore respectfully submits that the failure by the defendant to produce the witness Browne further demonstrates why this Court should grant the Petition and bring this lengthy litigation to an end. See *Perkins v. Standard Oil Co. of California*, 395 U.S. 642 (1969).

CONCLUSION

For the reasons and authorities stated in the Petition, the Reply Brief in Support of the Petition, and this Supplemental Brief in Support of the Petition, the Petitioner prays that the Petition be granted.

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Attorney for Petitioner.

September 20, 1976